In The

Supreme Court of the United States

No. 71-927

RALPH TROPIANO

Petitioner (Appellant),

vs.

ROBERT I. MOSELEY, WARDEN OF FEDERAL PENITENTIARY AT LEAVENWORTH, KANSAS,

Respondent (Appellee).

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CHARGE OF TRIAL COURT

The court charged the jury as follows:

151. The COURT. Ladies and gentlemen of the jury, my recollection is that in this case of the State of Connecticut versus Ralph Tropiano, the voir dire examination of prospective jurors therein began on Tuesday, September 21, 1965. It continued for a few days and as each of you were about to be examined, it must have become clear that it was essential to concentrate on what was going on then and on the questions addressed to you by counsel.

152. Subsequently, the selection of this jury having been completed near the close of the court day on September 29, 1965, you were sworn in as jurors in this case. Immediately, you were asked to listen closely to the reading of the amended information by our clerk on that day, Attorney Harold Ivey. Our regular clerk, of course, is Mr. White.

153. Again, on the next day, September 30, 1965, you were directed to give your entire attention to the presentation of evidence which then began before you and continued until yesterday afternoon; that was October 14, 1965. You were told of the same requirement concerning attentiveness as the arguments of counsel were about to begin today, and now I advise you, as I charge you in this case, that you must continue to give your undivided attention and thought to that which I am about to say to you.

154. Now, ladies and gentlemen, before I go further perhaps I should warn you that it may seem to you as I go along that the charge is rather lengthy. It will be a little bit more lengthy than some charges which I ordinarily deliver. The reason is not so much because the law pertaining to conspiracy, the crime here charged, is disturbingly complicated or involved, but rather that sometimes the application of the law to the facts of the case, particularly where there may be some dispute as to the facts, is a little bit difficult, and I am anxious to do all that I can to assist you in the decision of this case.

155. I have written out, or caused to be typed out, most of what I intend to say to you in the hope that thereby I can curtail the period of time necessary to deliver this charge to you. What I want to do, generally speaking, and in the first

place, is to make plain to you just what your function is in the decision of this case and to give you some guides as to the methods to be employed by you in the performance of that function.

156. Next, I intend to deal with the principles of law which are applicable to all criminal cases. Another part of the charge will be taken up with instruction to you as to what the law is which is applicable to this particular case, and then, very briefly, I intend to outline to you the claims of the respective parties and, also, very briefly, apply to those claims these principles of law which I shall have been giving to you in the rest of the charge.

157. Now in this case, as in all cases, there are two kinds of questions which have to be decided: There are questions of law and there are questions of fact. It is a proper activity of the presiding Judge to decide all questions of law which are involved in the case. That is to say, it is my function and responsibility, in the first place, to analyze the information and the evidence and decide what the issues of fact are which you will have to decide and then to outline to you those issues.

158. It is also my responsibility to decide and instruct you as to what the principles of law are which should control you in the decision of the facts, and for the sake of orderly procedure it is always necessary that the jury accept, as being the law of the case, the law which is given to them by the Judge in his charge. That is true even though the principles of law which are given by the Judge may differ in some particulars from the law which has been referred to by counsel in argument. It is true even though the law as given by the Judge is at variance with what the jury may think the law ought to be.

159. Of course, no man is infallible, and no judge will claim to be infallible on the law, but for the sake of orderly procedure you must ignore what you think the law ought to be or what counsel may have claimed the law to be, and accept as being the law of this case the law which I give you in this charge, and, as I say, that is the function which I have to perform in conneciton with the decision of this case.

160. Your function, on the other hand, is to decide all of the questions of fact involved in the case. You are the sole judges of the facts, and anything which I may say with reference to the facts of the case is said with no intention of in any way influencing you in the decision of what the true facts may be. It is your exclusive province to recall the evidence and to determine the facts. It is said only by way of illustration of the principles of law which I am trying to get over to you that I recall any evidence. So, as I say, that is your function in the case. You are to decide all of the questions of fact involved in the case, and you are the sole judges of the facts.

161. Now in performing your function, of course, one of the things which you have to do is to pass upon the credibility of the various witnesses who have appeared before you. In passing on the credibility of each of the witnesses, there are certain considerations you may well have in mind. One of these is the appearance which he made on the stand. Did he appear to be telling the truth? Did he appear to be honest? Did he appear to you to be intelligent; that is, did he appear to be a person who could have observed accurately what he is telling you about; who would be likely to have remembered it accurately and who is capable of reporting it to you accurately?

162. Another question for you to have in mind as regards each witness is the question as to whether the story he has told is plausible. Does it ring true, or are there inconsistencies in it? How does it fit in with other evidence in the case which you do believe? Does it jibe with that evidence? In short, does the testimony which was given by the particular witness whose credibility you are testing seem to you to be plausible?

163. In this connection you must also bear in mind that if you should conclude that any witness has been deliberately falsifying on any one material point in his testimony, you are privileged to take that fact into consideration in determining whether he has falsified on other points. Simply because you find that a witness has not repeated one fact to you accurately, it does not necessarily follow that he is wrong on every other point. A witness may even be deliberately falsifying on one point and yet be entirely truthful on all other points. But, if you find that a witness has deliberately lied on one material subject, it is only natural that you should be suspicious of his testimony on all subjects. Under those circumstances you are entitled to disbelieve his whole testimony. Whether you do disbelieve it or not, however, lies in your own sound judgment.

164. Another question which you may well ask yourselves in passing on the credibility of any witness is as to whether that witness has any bias of interest in the outcome of this case, and, if so, whether he has permitted that bias or that interest to color his testimony. It, of course, does not follow, simply from the fact that a witness does have a bias or does have an interest in the outcome of the case, that his testimony is to be disbelieved. There are many people who, no matter what their interest in the outcome of a case might be, or what their bias might be, would not testify falsely.

165. On the other hand, a jury should always bear in mind that if a witness has a decided bias or has an interest in the outcome of the case, that bias or interest offers something of a temptation to shade his testimony in accordance with his bias, or sway him to advance his own interest. It may even be that his bias or interest has so operated on his mind that he has come to believe what he wants to believe, and, therefore, he may testify falsely without at the time consciously realizing that his testimony is false. It is therefore obvious that if it should appear as regards any witness whose testimony or whose credibility you are testing, that he has some bias or some interest in the outcome of the case, that fact is one which the jury should take into consideration in weighing his testimony.

166. There is another matter dealing with credibility which I speak of now. As you know, there appeared here before you in this case several police officers who gave evidence. These included: Detective Francis Reynolds of the West Hartford Police Department, Lieutenant George Lovett of the West Hartford Police Department, and Detective Sergeant Stephen Ahern of the Special Service Squad of the police department in New Haven, Connecticut. You heard the testimony from these men.

167. In this connection you are instructed that you are not more readily either to believe or disbelieve a law enforcement officer simply because he is a law enforcement officer. Members of police departments, officers and such, are men who are under orders in the performance of their duties, and their testimony is neither to be believed or disbelieved by you any more or any less simply because they are police officers. They are employed to preserve the peace and law

and are not to be disregarded because they occupy that particular position.

168. On the other hand, you have a right to inquire whether they have any interest or motive or desire to injure this accused Ralph Tropiano, and, if so, you are to consider how far that bias affects their credibility. The testimony in evidence by such a witness as a police officer is to be weighed by you as you weigh that of any other witness. The same standards are to be used in weighing all evidence. In short, the mere fact that the witnesses concerning whom I speak of now are police officers should not militate for or against their credibility.

169. I should say a word at this point about the testimony of Pasquale Guglielmo. I believe he was the first witness in this case. If the story which he told on the stand is true, he was a member of the claimed conspiracy in this case, and, if so, therefore, an accomplice, so-called, of the other members of the conspiracy as claimed by the State and denied by the accused Ralph Tropiano.

170. It used to be the rule that a jury could never accept as true the testimony of an accomplice unless that testimony were supported and corroborated by other evidence in the case. That, however, is not the rule in this state today. It no longer is absolutely essential that the testimony of an accomplice be corroborated before it is believed by the jury. However, in weighing the testimony of an accomplice, it must be borne in mind that he himself is a self-confessed criminal, and everything else being equal, one would not believe the testimony of a man who has committed a crime involving moral turpitude as unreservedly as one would that of a man of good character.

171. Also, when you are testing the testimony of a self-confessed accomplice, like Pasquale Guglielmo, you should keep in mind that he may have had or may have such an interest in the outcome of the trial that his testimony may be colored by that interest. Because of such considerations the law now is that the jury should look with particular care at the testimony of an accomplice and scrutinize it very carefully before they accept it.

172. Indeed, in most cases it would be unsafe to rely on the testimony of an accomplice alone if it were not corroborated, but whether the jury, in any particular case, requires corroboration before it accepts the testimony of an accomplice, and if the jury does require corroboration at all, the amount of corroboration which it does require, all that rests in the sound judgment of the members of the jury.

173. In addition to the considerations which I have suggested to you there are probably many others which you as men and women of common sense, will apply in passing upon the credibility of witnesses. As a matter of fact, this whole matter of credibility of witnesss is simply one of common sense. In the everyday affairs of life you frequently come to a conclusion as to whether you believe or disbelieve something which has been told to you by another, and that you do by the application of sound common sense. That is what you are to do here. Except for the fact that here each witness has made oath to the truth of what he said, the situation is not very different from what it is when you are called upon in your everyday life to decide where the truth lies. Here, as there, you must, in large measure, be guided by your knowledge of human nature and your own common sense and good judgment.

174. There is another matter which I should speak of now. As regards some of the witnesses in this case, it has been shown or admitted that they have made statements outside of this courtroom which statements are claimed to be inconsistent with the testimony that they have given here under oath. Of course, that fact should be taken into consideration in weighing their testimony. The statements which they made outside of the courtroom are not to be taken as evidence of the truth of the fact stated therein in those statements. You may consider, for instance, whether or not the contradiction was or was not to some relevant, material fact, and whether or not it has been explained.

175. The fact that they made those statements bears on the case only insofar as it affects the credibility which you are going to give to their testimony, and the mere fact that a witness has made a statement outside which seems to you to be inconsistent with his testimony does not compel you to disbelieve his testimony here. It may well be that you consider that his testimony is true and his outside statement false or mistaken. But the fact that he has made a statement which is inconsistent with his testimony here in court is one thing which you should take into consideration in determining how much credence you will give to his testimony given here in court under oath.

176. After you have determined the credibility which you are going to give to each of the witnesses, you are then in a position to say how much of what each one has told you you are going to believe. You then join all that together and you have then the body of facts, which you believe to be true facts, which have come to you directly from the mouths of the various witnesses. You are then in duty bound to draw from

those facts inferences as to the existence of other facts; inferences, that is, which are reasonable inferences.

177. One sort of inference which you may have to draw in this case is the inference as to what information or knowledge the various people named in this information had in mind as they did certain acts. For instance, as I will explain to you in more detail later on, a combination of men into a conspiracy is not a criminal conspiracy unless they combine with the intention or purpose to do some unlawful act. Accordingly, you can see that if in this case you find that there has been a combination of men, you must go further and determine, if you can, what they intended to do, what purpose they had in combining. Or, again, as I will charge you later on, you may conclude that a man has become a member of a conspiracy if you find that he has done some act in furtherance of the conspiracy with knowledge that a conspiracy existed. For that reason, you see, you may have to decide whether this defendant, Ralph Tropiano, when and if he did certain acts, had knowledge that a conspiracy existed.

178. Now you can readily see that what a man's intention or knowledge was at any given time is quite largely a matter of inference. Of course, it is true that a man himself, if he chooses to do so, may take the stand and testify directly as to what his own intention or his own knowledge was, and that testimony you can believe or not, according to whether or not it warrants belief, but no witness can be expected to come here and testify that he looked into another man's mind and saw therein a certain intention or a certain bit of knowledge. The only way that you, the jury, can here determine what this man's, Ralph Tropiano's, intention or knowledge was at any given time is by determining what his conduct was and what

the circumstances were surrounding that conduct, and, from those, infer what his purpose, intention or knowledge was. To draw such an inference is not only the privilege but also the duty of a jury, provided, of course, that the inference drawn is a reasonable inference.

179. In this case, therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of this defendant Ralph Tropiano in the light of surrounding circumstances as to what purpose, what intention, and what knowledge was in his mind at various times.

180. Now, after you have decided what of the facts testified to by the witnesses you believe, and after you have decided what inferences are to be drawn as to the existence of other facts, you then have in mind the sum total of what you believe the true facts were about the claimed crime with which you are hereby concerned. You then apply to those facts the principles of law which I give you in this charge, and in that may arrive at your verdict.

181. In the information before you and which you will have in the jury room, a number of men have been charged with the crime of conspiracy. The charges against four of these men named in the information, as you have already been told of or are told of, have been otherwise disposed of on a previous occasion or trial; and there are left for your consideration the charges against Ralph Tropiano alone. He is here the sole defendant. Any knowledge or any surmise which you have or may learn or conclude as to the manner of handling of or the disposition of the charges against the other defendants accused in this information you must not let in any way influence your minds in passing on the case of this accused, Ralph Tropiano, whom you have here in charge.

182. The manner of disposition of the cases against the others has neither bearing upon nor relevancy to the question as to the guilt or innocence of this accused who is on trial. Of course, the question of the guilt or innocence of Ralph Tropiano must be decided solely on the evidence produced here in court on this trial, without any reference to what has been done or may be done with the other defendants named in the information.

183. Likewise, if it should have appeared to you that there may have been others implicated in any conspiracy which the State may have proved, that is, other than those named in the information, that fact should have no influence on your mind in determining the guilt or innocence of this man Ralph Tropiano now on trial. The failure to prosecute each and every one of the conspirators involved in a conspiracy or the failure to prosecute all those involved in a conspiracy together, or collectively, does not prevent or preclude the prosecution separately of a part of them or any one of them. So much is said for some of the considerations which you should have in mind as guides for you in weighing the evidence and deciding the facts of this case.

184. Speaking of evidence, you will recall that the jury was excused several times during the trial of this accused, both by request or on suggestion of counsel and by direction of Court itself. Previously you were told, and I deem it advisable to say it again, that you are not to gather anything favorable for or unfavorable against the prosecution, the defense, or counsel from any such procedure. Our courts deem it best that certain matters of evidence and questions of law are more properly proposed and resolved without any discourse thereon in your presence, and in this way you, the jury,

cannot be confused by any such discussion. Rulings in such matters are in the particular province of the Court and not at all part of the proper business or duty of the jury.

185. Another matter that I would like to speak of now is that in this case there were objections and rulings and exceptions. You are to consider only the evidence that was admitted and, if some evidence was given, but stricken, or some evidence offered and refused, you must not consider it, and if you heard it, your are to dismiss it from your minds. The rules of evidence have been evolved over a span of a great many years and have been proven to be the fairest and most just for the protection of both parties in the case, and, in fact, if I have made a mistake as to the rulings on evidence there is a way provided to correct that error. You need have no concern at all in this regard.

186. I speak to you further at this time about some of the principles of law which are applicable not only to this but to all other criminal cases. I speak of three principles of law which are applicable to all criminal cases, and, of course, they are applicable to this one. The first is what is called the doctrine of the presumption of innocence; the second is the doctrine that the burden of proof is upon the State; and the third is the rule that the State must prove its case beyond a reasonable doubt before a verdict of guilty can be brought in.

187. The doctrine of presumption of innocence, in a few words, is that the accused is presumed to be innocent unless and until his guilt is established and proven. That is, at the time this trial started the accused, Ralph Tropiano, appeared before you with a clean slate. Nothing which you may have known or surmised about him, if there was any such, may be considered by you in arriving at your verdict. The fact, for

instance, that the State's Attorney has decided to press a charge against an accused person should not weigh at all as against that accused in the minds of you, the jury, in passing on the question of his guilt or innocence. In short, so far as you are concerned, this accused is innocent of the crime here charged unless and until the evidence produced bfeore you here in court satisfies you of his guilt.

188. From the fact that a man is presumed to be innocent, the next principle follows; namely, that the burden of proof is upon the State throughout the trial to prove an accused guilty and an accused does not have to prove his innocence. That is to say, it is incumbent upon the State to carry the burden of proving its case in all its essential elements before a verdict of guilty may be rendered. Mr. Ralph Tropiano was under no obligation to go forward with witnesses to defend himself or take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf.

189. The accused had the right to testify if he so elects. He has the right to call witnesses and explained the case from his standpoint, but no inference of guilt should be drawn against him for the reason alone that he dose not elect to exercise either of those rights; because, as I have said, he is presumed to be innocent and the State has upon it impressed by law the burden of overcoming that presumption and establishing beyond a reasonable doubt every essential element of the crime charged. And, until that is established by evidence beyond a reasonable doubt, the presumption of innocence is not overcome.

190. This brings us to the third principle which is applicable to all criminal cases, before the jury may render a verdict of guilty, and that is, as I have said, that the State must prove every essential element of the crime charged beyond a reasonable doubt. This phrase "reasonable doubt" has no technical nor unusual meaning. It is self-explanatory. You get the real meaning of the phrase if you emphasize the word "reasonable." A reasonable doubt is a doubt for which a valid reason can be assigned. It is a doubt which is something more than a guess or surmise. A reasonable doubt is not such a doubt as is raised by one who questions simply for the sake of an argument. It is not a doubt suggested by the ingenuity of counsel which is not warranted by the evidence. A reasonable doubt is a real doubt, an honest doubt, a doubt which has its foundation in the evidence offered in the case or in the absence of evidence. It is such a doubt as, in the affairs which concern yourselves, that is, serious affairs, you would pay some heed to.

191. Absolute certainty in the affairs of life is almost never attainable and the law does not require absolute certainty on the part of a jury before it returns a verdict of guilty. What the law does require, however, is that, if, after hearing all the evidence, there is something in that evidence or lack of evidence which leaves in the mind of the jury, as reasonable men or women, a reasonable doubt of the guilt of the accused, then the accused must be given the benefit of that doubt and be acquitted.

192. It necessarily follows from that, that if any fact or any element bears equally two ways, one toward innocence and the other towards guilt, then it must be given that direction which tends toward innocence. No accused is to be convicted on mere suspicion. It is incumbent upon the State to negative

every supposition not in itself improbable, which is consistent with the innocence of the accused; and, if you can, in reason, reconcile all the facts present with any reasonable theory consonant with the innocence of the accused, then, of course, you cannot find Ralph Tropiano guilty.

193. Every crime is made up of several essential elements, and the burden here is on the State to prove beyond a reasonable doubt all of the essential elements of the crime of conspiracy as charged in the information in this case before it can ask for a conviction. What the essential elements of the crime here charged are, I will explain to you in just a short while. For the present it is enough for me to say that before a jury can return a verdict of guilty of any crime, the State must have proved every essential element of that crime beyond a reasonable doubt as the latter has been explained to you.

194. Another general principle of law which applies in nearly every criminal case, and certainly applies in this case, is that in order to be guilty of a crime, a person must have a criminal intent or guilty knowledge. This means that before a man should be found guilty of a crime, it must appear and be found beyond a reasonable doubt that in doing the acts complained of he had a guilty mind, or, as it is sometimes stated, an intent to do evil. If, in doing the acts complained of, he has not that intent he is not guilty of the crime. For instance, if a man is honestly mistaken as to the existence of certain facts; if, without gross negligence on his part he honestly believes that certain facts existed, and if, in the light of those facts which he believes to exist, the act charged against him would appear to be entirely moral, then the act with which he is charged is not a crime, even though it would be immoral in the light of the true facts. There, you see, the

act charged is not a crime because the man committing the act has no evil intent.

195. In the same way, if an accused has done that act complained of accidentally, the act is not a crime, because it was not done with an evil intent. For instance, if in this case you should find that the accused did some act which really assisted some others in accomplishing an unlawful act, but in doing it, because of his ignorance of the existence of some material facts, he did not realize that the doing of the act was in aid of any conspiracy, then the doing of that act would not make him guilty of the crime of conspiracy because it was done without any criminal intent.

196. What I have said about matters of fact or mistakes in fact excusing a man from crime because it removes from the crime the element of guilty intent does not apply to mistakes of law. Ignorance of the law excuses no one. If a man does on act which, in the light of the facts as he knows them to exist, is evil or immoral and is recognized by him to be such, it makes no difference that he is ignorant of the fact that the act is expressly prohibited by law or is unlawful. The reason for this rule is obvious. In most cases it would be impossible to prove that an accused did or did not know that the law expressly forbade the act which he is charged with committing.

197. Public policy therefore demands that we proceed on the presumption that everyone knows the law; and, therefore, the law is that no one may escape punishment for crime simply by saying that he was ignorant of the fact that the law forbade the doing of the act. The evil purpose essential to make an act a crime need not be an intention to break the law. It is sufficient if it is simply an intention to do the things which the law in reality does forbid.

198. To illustrate what I have just been saying by applying it to the present case if you should find that an unlawful conspiracy existed for the purpose of offering a bribe to police officers to permit and protect violation of law or the unlawful acts as alleged to the end that gambling establishments and illegal liquor establishments might be permitted to operate in the counties of Hartford or New Haven, or other counties; and should find that Ralph Tropiano, the accused, did some act in furtherance of the conspiracy, but that in doing it he did not know that the conspiracy existed or did not know what the real purpose of the conspiracy was, then you would have to find that the accused was not guilty, because in such a situation and in the light of the knowledge he had, what he was doing was not evil or immoral.

199. If, on the other hand, you should find that a conspiracy did exist for that unlawful purpose as charged, and should further find that Ralph Tropiano, the accused, did join the conspiracy with knowledge of its purpose, then he would not be absolved from guilt simply because he did not know that it was against the law to offer money to police officers concerned with the administration of justice with intent on his part to illegally influence the behavior of these officers in their offices to the end that gambling establishments and illegal liquor establishments be permitted to operate. His ignorance of the law would not excuse him. His intention to join a conspiracy with knowledge that it was for such a purpose is a sufficiently guilty intent in itself.

200. Now, I come a little bit more specifically to the law concerning conspiracy. The crime charged against the defendant in this case, as you know, is the crime of conspiracy. The charge is brought under Section 54-197 of our statute

law which reads in part as follows, and I quote in part from the statute:

> "Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement".

he shall be punished and so forth. You have no concern with punishment at all.

201. A careful reading of that statute shows that the crime of conspiracy as it is charged here is made up of three elements. That is, before you may bring a verdict of guilty against this defendant Ralph Tropiano you must be satisfied beyond a reasonable doubt that the State has proved against him each and all three of those elements. The three pertinent elements which relate to the crime of conspiracy as here charged are: First, that the accused participated in a combination, confederation or agreement, as charged; second, that the purpose of that combination was to accomplish an unlawful object, by unlawful means, and third, that one or more of the conspirators did some overt act in furtherance of the combination. Now, let me take up with you somewhat in detail each of these elements of the crime of conspiracy and point out what is involved in each.

202. The first element is the combination. That is, the first thing which you have to consider as regards this accused is: Was he a member of the combination as charged in the information?

203. First, let me point out that the unlawful combination is the gist and gravamen of the crime of conspiracy. The gist of the offense in the crime of conspiracy is not so much the doing of the unlawful act which the conspiracy was organized to accomplish, as it is the formation of the combination between two or more persons for the purpose of accomplishing those acts.

204. The reason why the law punishes the crime of conspiracy when it is proved is that by combining and pooling their resources, two or more individuals can presumably accomplish the unlawful act planned more effectively than could any one of the group acting alone. And so, although it is necessary to make the crime of conspiracy complete, that the conspirators do some act in furtherance of the conspiracy, still, in the eyes of the law, it is the combination of persons which is the foundation — the main point of and the most serious part of the offense. You must therefore keep it in mind clearly that the crime charged in this information is not the crime of bribery. The crime of bribery itself may, in part, be defined as an attempt, whether successful or the reverse, to influence an officer in the discharge of his official duties or the criminal offense or offering, giving, soliciting something of value with an intent to corruptly influence the action of a public official.

205. But, again, I say to you that bribery is not the crime that is here charged in the information. The crime charged in this amended information, which, as I have said, you will have with you in the jury room, together with the other exhibits, during your deliberations, is the crime of conspiracy, and what you will have to decide is, as to whether or not the defendant Ralph Tropiano entered a combination or confed-

eration to accomplish the unlawful acts set out in the information.

206. It is necessary that you should understand just what the law means by "combination or confederation." In order that two or more persons should be guilty of the crime of conspiracy, it is not necessary that there should be a formal or even expressed agreement among them. Of course, it is possible for a combination to be formed by way of various members entering into an express agreement among themselves, but, as I say, it is not necessary that it be done that way. All that is necessary in order to prove a combination or confederation among two or more persons is to show that they acted in concert to accomplish the unlawful purpose, each knowing that the other or others were also working with him toward that end.

207. One does not become a member of a combination in a conspiracy simply because he knows that a combination for unlawful purposes exists among a group of other persons and simply by or with passive acquiescence in or approval of such a combination. That is, he does not become a member under those circumstances if he does nothing about it. It requires more than knowledge and consent by silence on the part of a conspirator to sustain his connection with a conspiracy.

208. If he does know that the combination exists and then does something or makes some agreement in furtherance of it, or shows his intention to participate in some way, he thereby becomes a member of it. In other words, any person who takes part in a conspiracy, whether as a party to the agreement or by knowingly doing an act in furtherance of the

common design, with evil intent, has become a member of the conspiracy. Nor is negative assent enough, but there must be some active intent that the unlawful acts shall be committed and an intentional participation in the transaction with a view to the consummation of the common design and purpose.

209. In connection with those principles, I also state to you that if you do not find that Mr. Ralph Tropiano joined this conspiracy, then you must find him not guilty. However, if Mr. Tropiano was a member of the conspiracy and while a member of the conspiracy, at least one of the overt acts alleged in the information was committed by another conspirator for the purpose of effecting the objects of the conspiracy, that is enough. It is not necessary for the State to prove that Mr. Tropiano himself committed an overt act, because if an overt act was committed by one of the other conspirators, if you find Mr. Tropiano to have been in the conspiracy, then he is bound by the overt act of a co-conspirator.

210. A member of a conspiracy is chargeable with knowledge of the acts done by any of his fellow conspirators in pursuance of the conspiracy whether the particular conspirator was an original member of the conspiracy or joined it later.

211. It is, of course, rarely that the State is able to prove that a group of persons charged with conspiracy either conspired in public, openly and notoriously, or sat down and entered into an express agreement that they would unite to accomplish an unlawful purpose. People who conspire do not usually draw up articles of agreement. Proof of the conspiracy is not often made by open, direct and positive evidence of a crime. More generally, and more naturally,

proof of a combination is made by showing a repetition of acts of a character conducing to show mutual purpose.

212. In a conspiracy, also, it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination. But, when it is seen in connection with other acts of this accused, and other acts of others who were also named as conspiring, its true nature may be discovered. And so, as this species of proof is multiplied, a case of unlawful combination may be, thereby, made out.

213. To put it another way, the combination or confederation may be proved by circumstantial evidence; that is, by proof of the separate acts of individuals, and from circumstances from which the existence of the unlawful combination may be inferred. It is, of course, true that several persons may be engaged in doing separate acts or a separate series of acts, each of which is a crime, and may even come in contact one with the other in the doing of those acts, and still, if they are not acting in concert, there will not be any conspiracy.

214. Before you should bring in a verdict of guilty against the defendant in this case, therefore, you must be satisfied beyond a reasonable doubt that there was the conspiracy and that he participated in the unlawful combination charged. But, in order for you to find that such an unlawful combination existed or that this particular accused was a member of it, it is not necessary that you should find that he entered into a definite and express agreement with others to the effect that they would unite. It is not necessary that you should find that there was an open and expressed declaration among those named in the amended information in this case that

they would unite to accomplish the unlawful purpose charged. If you find that some of the various acts charged were committed in such a manner and under such circumstances that you are forced to conclude therefrom, beyond a reasonable doubt; that the defendant, doing whatever, if anything, you find he did do, was acting in concert with the others to accomplish the unlawful purpose charged, then you have found that such a combination existed among them as makes a combination in conspiracy. That is, it is a concert of action to accomplish an unlawful purpose that makes an unlawful combination or confederation, whether those who engage in such concert of action have expressly agreed to unite or not.

215. Now, from all of this you can see that it is entirely possible to have a situation where two or more persons combine to accomplish an unlawful purpose by the doing of a series of unlawful acts. This may constitute a single conspiracy. And as they go along the orginal conspirators may take others into the scheme for the purpose of using them to perform some of the unlawful acts which are incidental to these schemes. If those other persons do come into the scheme with the knowledge that the combination exists, even though they come in only for the purpose of doing a certain act which is in furtherance of the objects of the combination, they then become members of the combination, and when such newcomers do so join up they are just as much members of the conspiracy as they would have been if they had been members from the very beginning.

216. In other words, in order here to get a conviction of this defendant Ralph Tropiano it is not necessary for the State to show that he is one of the original combination. It is enough for the State to show merely that he did something

which actually was in furtherance of the purpose of the combination, with a guilty intent, and knowing that a combination among the other existed. Whether or not a man is one of the original group or comes into the group later makes absolutely no difference.

217. In the same way, it is, of course, not essential that all of the members of a conspiracy unite to do the same acts at the same time or that all of the conspirators engage in all of the activities of the conspiracy. Indeed, it more frequently happens in conspiracies that you have one man or group of men doing one act or series of acts at one time and another, or other men or other groups of men doing other or different acts at other times and other places. It is not even necessary, therefore, to show that all of the conspirators knew the other conspirators. So long as the entire group is acting in concert and with knowledge that a combination exists, and are doing things which are in furtherance of the purposes of the combination, that makes out an unlawful combination, even though the things that the various members of the group are doing or did do are or were different one from the other.

218. In other words, there may be a combination including one central person or control group. This center may have various branches going in different directions and doing different things. These branches might not help nor be associated with each other, but if what each of the various branches did was calculated to promote the common purposes of the center, then the whole thing, the center and all of its branches, would constitute a single combination, the proof of which is essential to support a conviction. The second element of the crime as charged is the accomplishment of an unlawful object by unlawful means.

219. Now, if you will further refer to the information, you will find that the State alleges that the ultimate purpose of the claimed combination was unlawful and the means by which the combination intended to accomplish its purpose was unlawful. That is, the information alleges the persons named therein combined to offer money to police officers concerned in the administration of justice with intent to illegally influence the behavior of such police officers in their offices to the end that illegal gambling establishments and illegal liquor establishments might be permitted to operate in the counties of Hartford and New Haven, and in pursuance of the combination did commit overt acts in furtherance of and to effect the object of the conspiracy. That, in the main, is what the information alleges to have been the ultimate purpose of the claimed combination.

220. Now, to offer money, as alleged in the information, by means of a conspiracy is unlawful. We have in our State a statute which provides that any person concerned in the administration of justice who takes anything to influence his behavior in office, and any person who gives or offers anything to any person concerned with intent to influence his behavior in his office, shall be punished. Those excerpts come from our statute on bribery.

221. Now, there is no claim in this case, ladies and gentlemen, that the officers, when they took the money that they did take, did, in fact, intend to allow illegal gambling establishments and illegal liquor establishments to be operated in the New Haven and Hartford areas, or anywhere. If the police officers had taken the money under these circumstances, that is, they had accepted money and were going to allow illegal gambling or illegal liquor establishments to operate,

they, of course, would have committed the crime of bribery. Again I say to you, however, no claim is made that these officers committed the crime of bribery. It is the claim of the State that these officers took the money only as evidence of the claimed offer of money to influence their behavior.

222. Now, as previously referred to, a pertinent provision of our bribery statute as it relates to the conspiracy alleged reads as follows: "Any person who offers anything to any person concerned with intent to influence his behavior in office" shall be punished. The mere offering of anything to a police officer with intent to influence his behavior in his office is unlawful. Therefore, if you conclude in this case that there has been a combination the purpose of which was to offer money to police officers concerned in the administration of justice with intent to influence the behavior of the police officers in their offices then such combination would be a criminal conspiracy.

223. I'll state that again. If you conclude that there has been a combination, that is, a conspiracy, the purpose of which was to offer money to police officers concerned in the administration of justice with intent to influence the behavior of those police officers in their offices, then such combination would be a criminal conspiracy.

224. A third necessary element of the crime of conspiracy as set out in the statute which I have quoted from relates to the requirement of some overt act to be done in furtherance of the conspiracy. I call to your attention the allegations in the amended information alleging certain of the overt acts. The doing of any such alleged acts as having been done in furtherance of the conspiracy would likewise be unlawful, and

I call your attention to the fact that it is not necessary that the State prove all of these overt acts alleged in the information. If they prove at least one of those overt acts and that said overt act was done pursuant to this conspiracy, to carry out the purposes of the conspiracy, that would be sufficient. And, if any of the defendants named in the information, except Licari, were in such conspiracy, even though only one of them committed the overt act, this defendant, Ralph Tropiano, alike with others, would be bound by it if they were members of the conspiracy.

225. To restate that principle in a different form, I state this to you: The gist of the offense in the crime of conspiracy is not so much in the doing of the unlawful acts which the conspiracy was organized to accomplish, but, rather, the formation of the combination between two or more persons for the purpose of doing the unlawful acts. So, it is that the crime of conspiracy is complete when the combination to commit unlawful acts is formed, and some overt act in connection therewith is done, and it is not necessary to prove that the unlawful purposes of the combination were actually accomplished or that anything other than the formation of the illegal combination was done toward accomplishing the purposes.

226. A conspiracy constitutes an offense irrespective of the number or variety of objects which the conspiracy seeks to attain or whether any of the ultimate objects are actually attained.

227. There is no duty on the State to prove that any illegal liquor establishments or any illegal gambling establishments were, in fact, opened, because the elements of conspiracy in this case are the conspiring together — that is, if you so find

— of two or more persons to commit the offense, namely, the offense of the offering of money to influence officers in their behavior in order to operate illegal gambling and illegal liquor establishments. And, as I stated, the conspiracy would be complete if it appears from the evidence that any one of the overt acts alleged in the information was committed by one of the conspirators for the purpose of effecting the object of the conspiracy.

228. A moment ago I mentioned Mr. Paul Licari, and I now explain. You could not find Ralph Tropiano guilty of the crime of conspiracy as charged unless you find that he combined with either one or more of the following who are mentioned in the information: Pasquale Guglielmo, Anthony DiBella and Alfred Amaio. It would not suffice to find against him for conspiring with Paul Licari alone, because he, Paul Licari, unlike Guglielmo, did not plead guilty, and unlike DiBella and Amaio was not found guilty. He, Paul Licari, was acquitted of this charge of conspiracy in the former trial which you have heard spoken of. So, as far as the instant trial and charge is concerned, he, Paul Licari, could not be a co-conspirator.

229. I will state that principle to you again. Because of the fact that a conspiracy consists of a combination of two or more persons, you, of course, could not logically find a single defendant such as Ralph Tropiano guilty unless you find that that single person combined or conspired with either one or more of these, Pasquale Guglielmo or Anthony DiBella or Alfred Amaio, or any combination of these three of those who are referred to in the information but are not on trial here before you at this time.

230. You will remember that I told you when I was discussing these principles of law that in order for a person to be a member of a conspiracy it is not essential that it appear that he had entered into any formal or express agreement with another that they would combine to do some unlawful act. A conspiracy is not necessarily an express agreement. It may be a mere tacit understanding. It is necessary to a conspiracy that there be a concert of action on the part of two or more persons in the doing of some unlawful act, which concert of action is the result of a combination existing among them.

231. Accordingly, it simmers down to this, that speaking generally a person becomes a member of a conspiracy if he does any act which furthers the purpose of the conspiracy with guilty knowledge and with knowledge that the conspiracy exists. So, that is the test which you must apply to this defendant who is on trial before you in order to determine whether he became a member of the conspiracy alleged, and that, of course, is assuming you find a conspiracy existed.

232. You are also to ask yourselves this: First, did this defendant, Mr. Ralph Tropiano, do anything which furthered the purpose of the conspiracy? Any act which was in pursuance of the conspiracy? You may find him guilty only if his act or acts are found by you to have been in pursuance of the conspiracy and a part of it. To be a part of the conspiracy the act must be one of the acts agreed upon by the conspirators or an act which was the ordinary and probable effect of the wrongful acts which form the purpose of the conspiracy so that the connection between them may be reasonably apparent.

233. Second, you should ask yourselves, did he do the act with guilty knowledge? That is, was it in pursuance of the conspiracy?

234. And third, when he did the act, did he have knowledge not only of what he was doing but also of the fact that a combination existed to do unlawful acts and that what he was doing was in aid of that conspiracy or combination?

235. The minimum which the State must prove against Ralph Tropiano, the accused, in order to make out a case against him is that he did some act which actually was in furtherance of the purpose of the conspiracy, and that when the did it he had guilty intent and knew that what he was doing was not so much an isolated act but rather in furtherance of the conspiracy charged.

236. If you find in this case that a conspiracy was formed to offer money, as alleged in the information, and you find that DiBella offered the money pursuant to the conspiracy, then the other members of the conspiracy would be guilty even though they were not present or took no part in turning the money over to the police officers, because the law is that the overt act necessary to activate a conspiracy may be that of any co-conspirator. Of course, if the State has failed to prove a conspiracy, this defendant cannot be connected even though you find that the money was handed over to Detective Reynolds and Detective Ahern by DiBella, nor would the paying over of the money be effective against this defendant if he is found not to be a co-conspirator.

237. Now, the existence of the conspiracy here charged and the connection, members of the jury, of this particular defendant with it cannot be established against the defendant by acts or statements of any other defendant or other persons done or made in his absence and without his knowledge or authority. Such acts or declarations do not involve him unless

and until it has been proved by evidence other than such acts or declarations beyond a reasonable doubt that he is a member of the conspiracy.

238. The declarations of a conspirator are admissible and are to be considered by you against a co-conspirator only if there is independent evidence of the existence of a conspiracy, and if the declaration is in furtherance of the conspiracy. However, when and if the State proves that he has become a member of the conspiracy, such declaration and acts of other conspirators or the commission of overt acts by other co-conspirators are his responsibility. But, he first has to be connected by the evidence to the conspiracy.

239. Now, I do not intend to review the evidence with you because counsel has spent about three hours this morning in arguing their respective claims, and they — that is, counsel for the State, Mr. Sperandeo, and counsel for the accused, Mr. Jacobs,—certainly adequately and thoroughly and fully argued all of the evidence. The State claims in this case, as you know by now, that the criminal design to conspire originated with Guglielmo as a result of a talk or talks that he had with DiBella and that he then approached Officer Reynolds. Thereafter, it is the claim of the State that Guglielmo brought DiBella and Reynolds together. Following this meeting, the State now claims that the defendants named in the information, but specifically Amaio and Tropiano, were identified with the conspiracy.

240. And, it is the claim of the State that these persons named in the information and mentioned now did combine and conspire to offer money to police officers with intent to illegally influence the behavior of said police officers in their

offices to the end that illegal gambling establishments and illegal liquor establishments might be permitted to operate.

241. The State claims, it has proven beyond a reasonable doubt that this accused, Mr. Ralph Tropiano, was a conspirator and that the conspiracy was formed to offer a bribe to the police officers as alleged in the amended information.

242. Now, the defendant Ralph Tropiano, members of the jury, did plead not guilty to the information, and, thereby, he denies that he is guilty of the crime as charged in the amended information, and, thus, denies the conspiracy and denies that he conspired or was any part of any conspiracy to offer any money to these officers to influence them in connection with the illegal operation of gambling establishments or the operation of illegal liquor outlets, as charged in the information.

243. In other words, he denies that with which he is charged, and, as I have said before, the burden is not upon him to prove his innocence. The burden was at the start of this case, and remained throughout this case, on the State to prove the accused guilty as charged beyond a reasonable doubt.

244. By way of a brief summary I will say this to you, and it is only a summary: The main questions upon which you will have to pass are three in number. First, has the State proved beyond a reasonable doubt that a combination or confederation such as alleged in the information existed?

245. Second, has the State proved beyond a reasonable doubt that the purposes of that confederation was to offer money to police officers concerned in the administration of

justice with intent to illegally influence the behavior of such police officers in their offices?

246. And, third, has the State proved beyond a reasonable doubt that Mr. Ralph Tropiano became a member of that conspiracy or confederation either by express agreement or by doing some act or acts which were in furtherance of the conspiracy with guilty knowledge or intent and with knowledge of the conspiracy?

247. It is your obligation to consider this defendant's case separately from all the others named upon the basis of the evidence or the lack of evidence. All of the evidence here produced in the trial of this case against Mr. Tropiano alone and no other evidence is to be considered and taken into consideration by you in passing upon his guilt or innocence. But if on all of the evidence you find that the State has failed to make out a case beyond a reasonable doubt that this defendant, Ralph Tropiano, was a member of the conspiracy as charged, then it is your duty to find him not guilty regardless of what the plea or verdict was as to any other defendant that is named in the information.

248. If you find that the State has made out a case beyond a reasonable doubt as to this defendant, then it is your duty to return a verdict of guilty as to him regardless of what your verdict may be as to any other defendant.

249. Your foreman or forelady will have to be prepared to answer orally either guilty or not guilty as to this defendant when you return. So, it is that in the course of your deliberations you must determine, as to this defendant, whether you are satisfied beyond a reasonable doubt, that, in accordance with the principles of law which I have given to you in this

charge, that Ralph Tropiano was a member of the conspiracy charged in the information. If you are so satisfied your verdict as to him is to be that of guilty. If you are not so satisfied your verdict as to him is to be that of not guilty.

250. Now, as this case is given to you for determination, ladies and gentlemen, I say to you that you are not to let sympathy for or prejudice aaginst any of the parties in any way influence your deliberations or your decisions in any form. Each case which is tried is apt to have an element or elements in it which might arouse sympathy or prejudice, and every trier of fact, whether that trier of fact be a Judge or member of a jury, must be careful to exclude such considerations from his or her mind. Remember that we are here to administer justice and not sympathy or prejudice.

251. You will recall on September 29, 1965, in accordance with our statute, you took this oath as you became jurors in this case:

> "You solemnly swear by the name of the ever-living God, that you will, without respect of persons or favor of any man, well and truly try, and true deliverance make, between the state of Connecticut and the prisoner at the bar, when you shall have in charge, according to law and the evidence before you; your own counsel, and your fellows, you will duly observe and keep; you will speak nothing, to any one, of the business or matters you have in hand; but among yourselves, nor will you suffer any one to speak to you about the same, but in court; so help you God."

That was the oath that you took on that date.

252. When you retire you should first choose a foreman or forelady whose duties it will be to preside over your delib-

erations and to report your verdict for you, with your assent, when the verdict is agreed upon.

253. You will begin your deliberations when there is sent to you into the jury room the information and all exhibits, with the exception of three which I will refer to in a moment; all of the exhibits that have been introduced in evidence except three of them. You are privileged to make such use of the exhibits as you may need to in the proper course of your deliberations.

254. I remind you that your verdict as to this defendant must be unanimous; it must be concurred in by all twelve of your number, and when you have agreed upon a verdict you will notify the Sheriff when your are ready to report. You will then be called into the courtroom and be inquired of as to what your verdict is as to this accused.

255. Now, members of the jury, all of the exhibits will be sent into your jury room, with three exceptions, as I have indicated. The tapes and the recording and play-back machine —these the Court is not going to send in to you. However, if during your deliberations you would desire to have any one or more of those tapes replayed, if you will notify the Sheriff in charge, I will have you brought out here and we will arrange to have whatever tape or tapes you desire replayed, should you want to have any replayed. I call your attention, however, that there is in evidence typed sheets, the exhibits which actually reflects transcripts of those tapes, and you will have that exhibit with you in the jury room. That may prove to be sufficient, but if not, and you want the tapes replayed, on notice, as I have indicated, I will be glad to have the tape or tapes played for you.

256. Now, you will recall that there was money introduced into evidence. I think it is said to be $2,000 in money. That is still in the Clerk's possession by my order. I am not going to send it into the jury room. I do not see any particular need to place the care of that sum upon you, but there is no dispute about the fact that this money was turned over to the police officers. However, if there is any reason you people would like to examine that exhibit of money, you may notify the Sheriff, he will contact me, and I will see that it is delivered to your jury room. However, there are photographs of the money in evidence which will be sent to you.

257. Now, what I have said just about covers everything that I have in mind to say to you ladies and gentlemen. The case is now in your hands for your deliberations thereon.

OPINION OF CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT *v.* RALPH TROPIANO

KING, C. J., ALCORN, HOUSE, GRILLO and RUBINOW, Js.

The defendant was convicted of the crime of conspiracy, involving the attempted bribery of police officers to secure protection for illegal gambling and liquor activities. There was evidence disclosed from which the jury could reasonably conclude that the alleged co-conspirators arranged a conference between the defendant and one of the officers at which the defendant's incriminating statements identified him as an active participant in the conspiracy. Thus, the defendant's motions for a directed verdict, to set aside the verdict, and to strike certain evidence were properly denied.

The defendant contended that the state's proof established five separate conspiracies. In actuality, the separate overt acts proved were individual facets of the single conspiracy alleged. The charge of the court concerning the state's burden of proving the conspiracy alleged was adapted to the issues and adequate for the guidance of the jury.

The charge adequately identified the alleged co-conspirators and charged the jury that only the acts and declarations of co-conspirators could be used against the defendant. The court was not required to adopt the language of the defendant's request to charge.

The court did not err in admitting certain statements of co-conspirators made during the pendency of the conspiracy. Although the statements referred, in part, to past facts, they were part and parcel of the discussions on the bribe payments, were made to reassure the officer of the soundness and prospective completion of the proposition made to him, were in furtherance of the conspiracy, and were based on personal knowledge.

Alhough certain questions asked by the defendant in cross-examining G were admissible to attack the witness' credibility on the ground of motive, interest or bias, the rulings excluding them were harmless because the verdict need not have been affected even if the jury chose to discredit his entire testimony, further cross-examination with the same objective was unrestricted, and the witness' status as a confessed co-conspirator testifying for the state furnished a basis for a conclusion by the jury that he was biased or interested.

The defendant's motion to quash or dismiss the information on the ground that the bench warrant for his arrest had been

issued without a showing of probable cause supported by oath or affirmation was not made until nineteen months after his plea of not guilty to the original information and ten months after his plea of not guilty to the amended information. Waiver of the illegality of an arrest and consent to the jurisdiction of the person can, in the absence, as here, of some mitigating factor, rest on the record of the plea of guilty or not guilty. Thus, the court properly denied the motion.

The attempt to show reversible error by culling a single word from the court's charge failed in the absence of a showing that it was reasonably probable that it misled the jury.

Argued May 7 — decided September 24, 1969.

Information charging the defendant and others with the crime of conspiracy, brought to the Superior Court in New Haven County and tried to the jury before *Meyers, J.*; verdict and judgment of guilty and appeal by the defendant. *No error.*

The appellant filed a motion for reargument which was denied.

Ira B. Grudberg, with whom, on the brief, was *Howard A. Jacobs*, for the appellant (defendant).

David B. Salzman, assistant state's attorney, with whom, on the brief, were *Arnold Markle*, state's attorney, and *Richard P. Sperandeo*, assistant state's attorney, for the appellee (state).

ALCORN, J. The defendant was convicted by a jury of the crime of conspiracy in violation of General Statutes § 54-197 and has appealed from the judgment rendered on the verdict and from the denial of his motions to set aside the verdict and

for judgment in accordance with his motion for a directed verdict. The information on which he was tried alleged, in substance, that between September 1, 1963, and February 20, 1964, he conspired with Anthony F. DiBella, Pasquale Guglielmo, Alfred J. Amaio and Paul Licari to offer money to police officers to secure protection for illegal gambling and liquor activities. We have previously sustained the conviction of DiBella and Amaio for their part in the same conspiracy, the nature of which has been summarized in the opinion in that case. *State* v. *DiBella*, 157 Conn. 330, 254 A.2d 477. We shall confine our factual recital in the present case to matters pertinent to the defendant's participation in the conspiracy and the various errors assigned in the proceedings which terminated in the verdict of the jury.

Among the thirty-five assignments of error are thirteen which attack findings made by the court. In passing upon the latter we are confronted with a variety of errors assigned in five distinct findings. In advance of the trial to the jury, the defendant made a motion to suppress evidence, a motion to dismiss or quash the information, a motion to quash or strike the amended information, and a motion to sequester witnesses. In disposing of each of these motions, the court, sitting without a jury, made separate findings of fact which can be corrected only as provided in Practice Book §628. Following the appeal, the court made a finding as required by Practice Book §635 which can be corrected as provided in §628 so far as that section is applicable. Practice Book §636. This requires consideration of whether the finding relating to the jury trial includes the material facts concerning which "there was evidence upon the basis of which the jury could reasonably find a certain fact proven, and the appellant

claimed to have proved it." Maltbie, Conn. App. Proc. §160, p. 198. We have examined the assignments of error addressed to the five separate findings in the light of these principles and conclude that no corrections material to our decision are required.

The remaining assignments of error are prolix and confusing. By a repetitious admixture of attacks on rulings on evidence on the charge of the court and on rulings on various motions, the defendant claims essentially, as set forth in his brief, that the court erred in refusing to direct a verdict of not guilty; that there was a fatal variance between the information and the proof; that the court erred in failing to charge the jury that acts and statements of witnesses not made in the presence of the defendant could not be used against him; that the court erred in admitting hearsay declarations of co-conspirators, in limiting cross-examination of state's witnesses, in denying the defendant's motion to sequester witnesses, and in refusing to charge as requested; and that the defendant was illegally arrested on a warrant issued without probable cause supported by oath or affirmation.

I.

After the state and the defense had rested, the defendant moved for a directed verdict on the ground that the evidence was insufficient to prove the defendant's guilt beyond a reasonable doubt. The court denied the motion, and that denial is assigned as error. After the jury had returned a verdict of guilty, the defendant moved to set aside the verdict and for judgment in accordance with his motion for a directed verdict. This motion also was denied, and that denial is assigned as error.

The correctness of the court's ruling on each motion must be tested by the evidence printed in the appendices to the briefs. *State* v. *Mortoro*, 157 Conn. 392, 393, 254 A.2d 574; *State* v. *Cyuro*, 156 Conn. 391, 397, 242 A.2d 734, cert. denied, 393 U.S. 937, 89 S. Ct. 301, 21 L. Ed. 2d 274. It was the state's burden to prove that the defendant did some act which actually was in furtherance of the purposes of the general conspiracy and that, when he did it, he had a guilty intent and knew that what he was doing was a part of a general scheme to commit some of the unlawful acts alleged in the information. *State* v. *Hayes*, 127 Conn. 543, 563, 18 A.2d 895.

From the evidence before them the jury could reasonably have concluded that a gambling operation, involving men from New Haven, had been in the pending stage for about a year prior to September 17, 1963. On that date, Guglielmo approached Francis Reynolds, a detective in the West Hartford police department, with an offer of between $10,000 and $12,000 for police protection of the operation. Thereafter DiBella entered the picture, and extensive discussion followed for a considerable period of time with the objective of arranging for protection of illegal operations in New Haven as well as in West Hartford by enlisting the aid of Stephen P. Ahern, a sergeant in the New Haven police department. On January 30, 1964, DiBella informed Reynolds that the payoffs would be made from the defendant, who was the "top man", to DiBella, to Reynolds and from him to Ahern. After discussing the division of the payments, DiBella went to a telephone and on his return said: "Come on, we are going to New Haven." Reynolds and DiBella then drove to a restaurant in New Haven where they met Licari and the defendant, and

DiBella introduced Reynolds as the man he had been "talking about the deal with." Licari and DiBella then left Reynolds and the defendant alone in a booth at the restaurant, and the defendant told Reynolds: "The only thing I want from Ahern are the crap games. Horses can come later."

Reynolds asked the defendant how much Ahern was to get, and the defendant said: "Quote a figure." Reynolds quoted $475 to $500 a week, and the defendant voiced approval of the amount suggested. The defendant said that he wanted the crap games operated every night of the week otherwise they would "get cold and the people would go to Bridgeport." Following this conversation, Licari and DiBella returned to the booth, and, after discussion concerning Licari, who was going to run the crap games, DiBella and Reynolds went home.

From the evidence recited the jury could properly conclude that the defendant's own conduct clearly identified him as an active participant in an illegal conspiracy. *State* v. *Hayes*, supra. The court did not err in refusing to direct a verdict of not guilty or in denying the motion to set aside the verdict.

At the conclusion of the evidence, the defendant moved to strike certain of the testimony of Guglielmo, Reynolds and Ahern because the state had not offered independent evidence of the conspiracy and the defendant's connection with it sufficient to make the testimony admissible. Recitation of further facts is unnecessary since it is apparent that the court did not err in denying the motion.

II.

The claim made in the brief that the proof at the trial was at fatal variance with the information is not specifically assigned as error and consequently is not properly raised. Practice Book § 651. Argument on the point insinuates itself into the case through the errors assigned in the denial of the motions to direct and to set aside the verdict, and through an assignment that the court erred in refusing eleven requests to charge, four of which related to the distinction to be drawn between a single conspiracy and several conspiracies. The purport of the argument is that the court should have charged that the state was required to prove a single conspiracy in order to convict the defendant and that a conviction could not be had if the jury concluded that the several defendants engaged in separate conspiracies even though one conspirator engaged in all of them.

The amended information charged the defendant with conspiring with the other named persons to offer money to police officers to influence their conduct so that illegal gambling and liquor operations could be conducted in Hartford, New Haven and other counties and specified ten overt acts in furtherance of that conspiracy. The finding is that the state offered evidence to prove and claimed to have proved nine of the overt acts alleged. The defendant does not contend otherwise but asserts that the state's claims of proof established five separate conspiracies. In an endeavor to support this claim, the defendant utilizes overt acts which, in actuality, are individual facets of the single conspiracy charged.

The defendant makes no claim that he offered to prove, or proved, multiple conspiracies. Instead, he contends that

"based upon the State's evidence" the court committed error in refusing his requests to charge concerning the state's burden of proving the single conspiracy alleged. We have examined the charge on this phase of the case and conclude that it was adapted to the issues and adequate for the guidance of the jury. *Berniere* v. *Kripps*, 157 Conn. 356, 358, 254 A.2d 496; *Lopes* v. *Connecticut Light & Power Co.*, 145 Conn. 313, 315 142 A.2d 135.

III.

Detective Reynolds had immediately reported to his superior at police headquarters the proposition made to him on September 17, 1963, by Guglielmo. Thereafter, meetings which he had with the conspirators were under the surveillance of the West Hartford police, and tape recordings were made of telephone conversations which he had with DiBella. These recordings and the stenographic transcriptions made of them were introduced into evidence. When they were introduced, counsel for the defendant requested the court to charge the jury that Reynolds' parts of the conversations were not binding on the defendant because Reynolds was not a co-conspirator and had said nothing in such a capacity. Counsel for the defendant also filed a written request to charge that "[t]he acts and declarations of Reynolds and Ahern, outside the presence of this defendant, are not evidence against him."

The substance of the conversations concerned the defendant's role in the conspiracy, and the defendant concedes that the court did not err in receiving the recordings and transcripts in evidence.

Although Reynolds' part in the conversations was not admissible to prove the truth of any assertions made by him, since he admittedly was not a co-conspirator, nevertheless his portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statements. See *United States* v. *Morello*, 250 F.2d 631, 634 (2d Cir.); 7 Wigmore, Evidence (3d Ed.) §§ 2097, 2099. The admission of the entire conversation tended to eliminate the possibility that the jury would interpret the meaning of DiBella's statements out of context rather than to prejudice the defendant.

Cautionary instructions concerning the effect which the jury should give to statements made by DiBella as distinguished from those made by Reynolds were called for, however. *United States* v. *Morello*, *supra*. Nevertheless, the court was not required to adopt the exact language of the defendant's request so long as it gave the jury a clear understanding of the issue and a proper guidance in determining it. *State* v. *Alterio*, 154 Conn. 23, 27, 220 A.2d 451, and cases cited.

An examination of the charge discloses that the court told the jury specifically that the information charged the defendant with conspiring with Guglielmo, DiBella and Amaio, to the exclusion of the police officers and Licari. The court explained that Licari had been tried and acquitted of conspiracy previously and that the state claimed that the officers took money only as evidence of the conspiracy alleged. The jury were told that acts or declarations of a co-conspirator did not involve the defendant until he had been proved to be a member of the conspiracy by other evidence but that once he had been proved to be a member of the conspiracy the declarations of a co-conspirator in furtherance of the conspiracy were admissible against him.

It was thus made clear to the jury, by specific identification, who the conspirators were alleged to be. Not only were the officers excluded from that category but the charge abundantly emphasized to the jury that the part which the officers played in the scheme of things was to bring the conspirators to justice. The charge of the court adequately alerted the jury to the fact that only the acts and declarations of co-conspirators in furtherance of the conspiracy could be used against the defendant. This statement necessarily excluded the acts and declarations of the officers, and this was the substance of the defendant's request to charge. *United States* v. *Morello, supra.*

IV.

The defendant assigns error in rulings of the court in admitting into evidence statements made by co-conspirators.

Reynolds testified to a conversation with Guglielmo in which Guglielmo said that the deal was still on. Reynolds asked him if he was serious, and Guglielmo said, "You don't think I would be kidding about something like this?". After a discussion about the money involved and the division of it, Reynolds asked if Guglielmo had had any further meetings in New Haven, and he said, "No. I don't want to be seen with that type of crowd." As the answer continued, the defendant's counsel objected that it was narrative and not within the co-conspirators' exception, but the court allowed the answer to be completed.

Included in the recordings of telephone conversations, and the stenographic transcriptions thereof already referred to, were statements made by DiBella in a conversation with Reynolds in which DiBella said, "Well, you see, Whitey

[meaning Tropiano]—nobody is ever gonna catch him. Whitey has got operations going that he ain't got no part of himself and they're running because no matter how many times they catch his men his men are—they'll die." DiBella also said, "— you can never tell whether it's part of his [Tropiano's] operation. But, without him the town don't run." The defendant's counsel objected to both statements on the ground that they constituted narrative and were not in furtherance of the conspiracy, and the court overruled the objection.

Included in the recordings and the stenographic transcriptions was a statement by DiBella to Reynolds, "That's right. He'll—he'll honor Mr. Ahern in his own particular way—it'll be a crude way—he'll say 'I don't know—you know what he wants, he's waiting for me to get myself off guard, but he ain't gonna catch me.'" The defendant's counsel objected on the ground that the statement constituted speculation on DiBella's part and was his interpretation of the operation of someone else's mind, and the court overruled the objection.

The defendant now argues that the statements quoted were not made in furtherance of the conspiracy and so were not admissible under the so-called co-conspirators' exception to the hearsay rule. The rule that any declaration made by a co-conspirator, pursuant to the common object of the conspiracy and in furtherance of it, is admissible against all of the conspirators once the combination is established was enunciated by this court over one hundred years ago in *Cowles* v. *Coe*, 21 Conn. 220, 234. In more recent times, the requirement that the declaration be in furtherance of the conspiracy has been the subject of discussion. Professor Edmund M. Morgan in "The Rationale of Vicarious Admissions," 42 Harv. L. Rev. 461, has urged that that requirement of the rule be

eliminated since the trustworthiness of the declaration is guaranteed by the circumstances that (p. 481) "the fact stated is consciously against the interest of the declarant." See also Model Code of Evidence rule 508 (b); Uniform Rule of Evidence 63 (9) (b), 9A U.L.A.; Levi, "Hearsay and Conspiracy, A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule," 52 Mich. L. Rev. 1159, 1167; note, "Developments in the Law [of] Criminal Conspiracy," 72 Harv. L. Rev. 920, 985.

The defendant relies heavily on *Krulewitch* v. *United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, in which the court appears to reject Professor Morgan's suggestion, although the conversation involved in that case took place after the conspiracy had ended and concerned an anticipated criminal prosecution. Any detailed discussion of the soundness of the portion of the rule which requires statements of co-conspirators to be "in furtherance of the conspiracy" is, however, unnecessary in the present case. In the first place, the statements objected to were clearly made during the pendency of the conspiracy, and the defendant does not contend otherwise. Furthermore, even though the statements, in part, may be interpreted to refer to past facts, they were part and parcel of the discussions concerning the bribe payments and were obviously made for the purpose of reassuring Reynolds of the soundness and prospective completion of the proposition made to him. Any references to past facts were natural and pertinent to the conspiracy and were therefore in furtherance of it. *United States* v. *Pardo-Bolland*, 348 F.2d 316, 324 (2d Cir.), *cert. denied*, 382 U.S. 944, 86 S. Ct. 388, 15 L. Ed. 2d 353; *United States* v. *Annunziato*, 293 F.2d 373, 380 (2d Cir.), *cert. denied*, 368 U.S. 919, 82 S. Ct. 240, 7 L. Ed. 2d 134. The

statements which are claimed to be speculation and interpretation of the operation of someone else's mind by DiBella were, even if characterized as expressions of opinion, based on DiBella's own personal knowledge. See *Stephanofsky* v. *Hill*, 136 Conn. 379, 382, 71 A.2d 560. Like the other statements they were calculated to reassure Reynolds of the soundness of the proposition made to him. The court did not err in admitting the testimony.

V.

The defendant assigns error in rulings of the court during his cross-examination of witnesses for the state.

During cross-examination of Reynolds, the witness stated that his recollection was exhausted. Defense counsel then asked Reynolds when he had last looked at any records, transcript or otherwise, concerning the subject under inquiry, and Reynolds said he could not recall. Defense counsel then asked whether the witness' recollection was refreshed "whenever it was you looked over your notes." The state objected that "[i]t's recollection that's being refreshed at this time, not at some other time," and the court sustained the objection. The ruling was correct. Another ruling improperly conjoined in this assignment requires no discussion.

In cross-examining Guglielmo, defense counsel questioned him concerning a statement which he read from the transcript of a former trial and which was not an exhibit. On objection by the state, the court stopped the reading, stating that counsel could not read from the record "without turning in the record." The defendant now claims that the ruling balked him from showing a prior inconsistent statement of the witness. The

defendant does not point to the alleged inconsistency, and the transcript discloses none.

In cross-examining Reynolds concering the dates of several conversations, the witness said he could not recall but could answer exactly if allowed to look at his notes. Defense counsel did not allow the witness to refresh his recollection from his notes, and the court refused to permit a repetition of questions which the witness had said he could not answer from his present recollection. There was no error in that exercise of the court's discretion.

On direct examination Reynolds had testified that he met Sergeant Ahern when he arrived at a parking lot for a meeting with DiBella on February 13, 1964. In a previous trial he had testified that Ahern drove in after he and DiBella had arrived. This variance in his testimony was pointed out by defense counsel in cross-examination. Defense counsel now makes the footless complaint that the court, after examining a report made by Reynolds to his superiors, which included the details recorded in a memorandum made by him of the meeting of February 13, 1964, both of which had been marked for identification, found no inconsistency in them beyond what was already in evidence and therefore refused to allow further cross-examination on the incident by reference to the documents.

Before the trial of the defendant began, Guglielmo had pleaded guilty to the same crime as that with which the defendant was charged and had received a suspended sentence. At the start of the defendant's trial, the court informed the jury that Guglielmo had pleaded guilty. This was the fact, although that plea was entered after an earlier not guilty plea. On cross-examination, defense counsel asked Guglielmo

whether, before trial, he had pleaded not guilty; whether he was sentenced "after the last case was disposed of"; and whether, before the last case started, he had conferred with the state's attorney as to what his testimony would be. The state's objection to each question was sustained. Defense counsel stated as the ground for admissibility: "I am entitled to go into the question of motive for testimony."

The questions were admissible for the purpose of attacking the witness' credibility on the ground of motive, interest, or bias. *State* v. *Luzzi*, 147 Conn. 40, 46, 156 A.2d 505. Subsequent cross-examination indicates that the defendant's apparent objective was to indicate to the jury some motive, bias, or interest in the witness by suggesting that promises of leniency were made to him which were productive of the change of plea and which resulted in the suspended sentence. The rulings of the court excluding the questions for the purpose stated were erroneous. In order to constitute reversible error, however, the rulings must have been both wrong and harmful. *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585. If the record discloses that the rulings could not reasonably have affected the verdict, they were not harmful and hence not reversible error. *DeCarefal* v. *Colonial Trust Co.*, 143 Conn. 18, 21, 118 A.2d 798.

Guglielmo's direct testimony, which covers fifty-four pages of the trial transcript, shows that Guglielmo was offered by the state principally to explain Reynolds' connection with the case. His testimony under cross-examination by the defendant, which covers 122 pages of the trial transcript, dealt with his long acquaintance with, and proposal to, Reynolds, his introduction of Reynolds to DiBella, his talks with DiBella and Reynolds regarding Reynolds' proposed activity, and his

express denial that he either offered any money to Reynolds or expected to receive or actually received anything from DiBella for approaching Reynolds. His testimony did not tend toward proof of the crime charged, and the verdict need not have been affected even if the jury chose to discredit his entire testimony. Under those circumstances the rulings complained of were harmless. *DeCareful* v. *Colonial Trust Co.*, *supra*.

Beyond that, however, the transcript discloses that cross-examination continued after the objections to the questions in issue were sustained, during which, over objections by the state, and subsequent to the rulings complained of, the defendant was permitted to ask Guglielmo the direct question whether any promises had been made to him, and the witness answered, "There was no promises made." Thereupon, the defendant dropped the subject, made no attempt to test the answer he had received, and continued his cross-examination, confining it to other matters. The defendant does not now claim that any promises were actually made to Guglielmo or that cross-examination to test his express denial of any promise was in any way restricted. Nor did the defendant attempt to question the witness concerning any circumstances surrounding either the pleas or the sentence which would tend to suggest even a hope or expectation of leniency productive of a motive or interest likely to affect Guglielmo's credibility. Our examination of the transcript discloses no curtailment of proper cross-examination which would render the rulings complained of harmful or prejudicial. See cases such as *People* v. *Smith*, 26 Cal. 2d 285, 858, 161 P.2d 941; *People* v. *Miceli*, 101 Cal. App. 2d 643, 647, 226 P.2d 14; *People* v. *Stone*, 89 Cal. App. 2d 853, 860, 202 P.2d 333.

Finally, Guglielmo's position as a self-confessed conspirator testifying for the state furnished a basis upon which the jury could, if it decided to do so, determine that he was a biased or interested witness. 3 Wigmore, Evidence (3d Ed.) § 967. The court, in effect, so charged, clearly described Guglielmo's status to the jury, and charged them that it required that they carefully scrutinize his testimony. The defendant received apparently free and full answers to his questions regarding Guglielmo's conferences with the state's attorney concerning his testimony. When viewed from every angle the rulings complained of were harmless.

VI.

Before the trial to the jury began, the defendant made a motion to sequester witnesses. The court denied the motion, and the denial is assigned as error. The motion, which was in writing, stated, "The defendant Ralph Tropiano moves that the witnesses for the State be sequestered." No reasons were stated. In argument of the motion the defendant claimed that the essence of the state's case involved conversations between Guglielmo and Reynolds, Guglielmo and DiBella, and DiBella, Reynolds and Ahern. The claim was that sequestration of the witnesses was necessary in order to prevent them from unconsciously or consciously shaping their testimony. A similar motion was made and ruled on in *State v. DiBella*, 157 Conn. 330, 342, 254 A.2d 477, and the same principles as in that case apply here. Furthermore, in the present case, the court was cognizant of the fact that, as a result of the prior case, the witnesses named could be fully aware of the testimony elicited at that trial to which any coaching in the present case could add little. The court did not err in denying the motion. *State* v. *DiBella, supra.*

VII.

The defendant assigns error in the denial of his "motion to dismiss and/or quash" the information on the ground that the bench warrant under authority of which he was arrested was issued without a showing of probable cause supported by oath or affirmation.

At the hearing on the motion which took place prior to the trial, the court found that the defendant was arrested on February 20, 1964, by virtue of a bench warrant issued by a Superior Court judge on that date. Following the procedure which was then customary, the warrant was issued without oath or affirmation on the oral representation by the state's attorney that he had reasonable grounds to believe that the crime charged had been committed within the jurisdiction. Counsel entered a general appearance for the defendant, and, on March 3, 1964, the defendant pleaded not guilty to the charge made against him. The information was later amended, and, on November 17, 1964, the defendant again entered a not guilty plea to the amended information. The motion to dismiss and/or quash the information was not made until September 20, 1965, the day preceding the start of the jury trial. Thus, no question was raised as to the validity of the arrest until nineteen months after issue was joined on the original information by a not guilty plea and ten months after a like plea to the amended information.

In *State* v. *Licari*, 153 Conn. 127, 214 A.2d 900, we said (p. 129) that an attack such as that now made on the court's jurisdiction of the defendant's person is one which should be made before a plea of guilty or not guilty and (p. 130) that a failure to move in timely fashion is strong evidence of consent to jurisdiction of the person (p. 131) although on the

record in that case we could not, as a matter of law, find such consent. In *State* v. *Orsini*, 155 Conn. 367, 379, 232 A.2d 907, we said that the invalidity of the bench warrant was waived by a failure to raise the issue during the lapse of almost a year between the date of the arrest and the date of defendant's cognizance of the existence of the issue. See also *State* v. *Darwin*, 155 Conn. 124, 144, 230 A.2d 375, rev'd on other grounds, 291 U.S. 346, 88 S. Ct. 1488, 20 L. Ed. 2d 630.

We have so recently discussed the proper and timely way in which to raise the issue attempted to be raised by the defendant's motion to dismiss that the discussion need not now be repeated. *Reed* v. *Reincke*, 155 Conn. 591, 236 A.2d 909. "Proof of waiver of the illegality of an arrest and consent to the jurisdiction of the person can, and indeed does, in the absence of some mitigating factor not present here, rest on the record of the plea of guilty or not guilty." *Id.*, 601.

The court did not err in denying the motion to "dismiss and/or quash" the information.

VIII.

The defendant assigns as error that the court refused eleven written requests to charge. Four of them related to the requirement that the state must prove a single conspiracy. These we have discussed in connection with the claim of variance. One, we have discussed in connection with the introduction into evidence of the tape recordings. Five others receive only cursory treatment in the defendant's brief, and

an examination of the charge discloses that it substantially complied with the requests involved.

The one remaining attack on the charge concerns the subject of the defendant's failure to testify. The defendant filed a written request that the court charge as follows: "The defendant is not required to testify on his own behalf. The law gives him the right not to testify. Here the defendant Ralph Tropiano exercised his right not to testify. I instruct you that you must not consider the defendant's exercise of his right not to testify as evidence of guilt. You may draw no inference of any kind against the defendant because he did not testify." The court charged as follows: "From the fact that a man is presumed to be innocent, the next principle follows; namely, that the burden of proof is upon the State throughout the trial to prove an accused guilty and does have to prove his innocence. That is to say, it is incumbent upon the State to carry the burden of proving its case in all its essential elements before a verdict of guilty may be rendered. Mr. Ralph Tropiano was under no obligation to go forward with witnesses to defend himself or to take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf. The accused had the right to testify if he so elects. He has the right to call witnesses and explained [sic] the case from his standpoint, but no inference of guilt should be drawn against him for the reason alone that he does not elect to exercise either of those rights; because, as I have said, he is presumed to be innocent and the State has upon it impressed by law the burden of overcoming that presumption and establishing beyond a reasonable doubt every essential element of the crime charged. And, until that is

established by evidence beyond a reasonable doubt, the presumption of innocence is not overcome."

At the conclusion of the charge no exception was taken other than to the court's failure to charge as requested. Consequently, the error now assigned raises only the question whether the charge sufficiently covers the subject matter of the request. *McMahon* v. *New York, N.H. & H.R. Co.*, 136 Conn. 372, 375, 71 A.2d 57. "The failure to charge in the exact language of the requests is not error." *Mace* v. *Conde Nast Publications, Inc.*, 155 Conn. 680, 687, 237 A.2d 360.

The defendant now would complain of the court's use of the word "alone" and its failure to tell the jury that the defendant "had the right not to testify." He urges that the implication is that no inference from his failure to testify could be drawn unless it is related to other factors in relation to his silence. Quite aside from the fact that the claim now made was not made the basis of an exception at the conclusion of the charge, the attempt to assert reversible error by culling a single word from the charge must fail unless it is reasonably probable that the jury were misled by it. *Penna* v. *Esposito*, 154 Conn. 212, 215, 224 A.2d 536. Considering the charge on this issue as a whole, as we must, we find no reasonable possibility that the jury were misled. The charge concerning the defendant's failure to testify was fully adequate for the guidance of the jury. *Michaud* v. *Gagne*, 155 Conn. 406, 412, 232 A.2d 326.

There is no error.

In this opinion the other judges concurred.

PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF KANSAS

Petitioner prays for a Writ of Habeas Corpus pursuant to 28 U.S.C., Sec. 2241.

1. Petitioner is presently serving two concurrent twelve year sentences for violation of and conspiracy to violate the Hobbs Act, 18 U.S.C.A., Sec. 1951. Said conviction occurred on November 15, 1968. Subsequent thereto, Petitioner was convicted by Jury in the Superior Court in New Haven County, Connecticut, for the crime of conspiracy in violation of General Statutes, Sec. 54-197. He was sentenced to serve three to six years in the Connecticut State Penitentiary commencing upon the expiration of the Federal sentence, which he is now serving. His timely appeal was denied by the Supreme Court of the State of Connecticut on October 29, 1969. A Petition for Writ of Certiorari to the United States Supreme Court was denied on June 8, 1970.

2. Warden Robert I. Moseley, the Respondent herein, is the Warden of the Federal Penitentiary at Leavenworth, Kansas, and, under the present posture of the instant case, as hereinabove outlined, is to remand Petitioner, upon the expiration of his Federal sentence, to the Connecticut State Prison so that the serving of the said sentence may be commenced.

3. The conviction and sentence, pursuant to which Petitioner is to be remanded to the Connecticut State Prison, was imposed in violation of the Due Process Clause of the

Fourteenth Amendment to the United States Constitution and of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution. The facts showing this violation are as follows:

(A.) The Trial Court's Charge With Regard To Petitioner's Election Not To Testify Was A Prejudicial Comment Thereon.

The court refused the following charge requested by Petitioner: "The Defendant is not required to testify in his own behalf. The law gives him the right not to testify. Here, the Defendant exercised his right not to testify. I instruct you that you must not consider the Defendant's exercising of his right not to testify as evidence of guilt. You may direct no inference of any kind against the Defendant because he did not testify."

The Court, in lieu thereof, charged the Jury as follows: "The Defendant was under no obligation to go forward with witnesses to defend himself or to take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf. The accused has the right not to testify if he so elects. He has the right to call witnesses and explain the case from his standpoint, but no inference of guilt should be drawn against him *for the reason alone* (emphasis supplied) that he does not elect to exercise either of these rights."

Petitioner contends that the words, "for the reason alone" as well as the absence of an instruction that the Petitioner had the right *not* to testify constituted a prejudicial comment

on his failure so to testify. The Connecticut Supreme Court in ruling adversely upon this contention utilized the standard as to whether or not it is "reasonably possible" that the Jury was misled by the instruction.

Petitioner submits that the charge as given constitutes or involves a constitutional error within the purview of *Griffin* v. *State of California* (380 U.S. 609, 85 S. Ct. 1229) applying the standard of error enunciated by *Chapman* v. *California* (386 U.S. 18).

(B.) Evidence Was Admitted Against Petitioner Constituting Declarations Of A Police Officer, Outside The Presence Of Petitioner And Who Was Not A Member Of The Alleged Conspiracy.

There was admitted into evidence against Petitioner tape recordings between a police officer and co-Defendant and alleged co-conspirator, one DiBella. It was apparent that the police officer had intentinoally drawn from DiBella various derogatory statements regarding Petitioner and that his purpose in so doing was to involve Petitioner in the alleged conspiracy. All of these recorded conversations were held in the absence of Petitioner. The Connecticut Supreme Court justified the admission of this evidence on the ground that the statements of the co-conspirator police officer were admissible for the limited purpose of giving meaning and coherence to DiBella's statements. Although the charge to the Jury named the alleged co-conspirators (making no reference to the police officer with whom DiBella had conversed) and instructed the Jury that once the Petitioner had been proved to be a member of the conspiracy by other evidence, then the declarations of

a co-conspirator were admissible against him, it was error to expect the Jury to disregard the police officer's incriminating statements with regard to Petitioner and to only consider them for the purpose of "giving meaning" to the statements of DiBella.

(C.) Petitioner's Counsel Was Prevented From Eliciting, Upon Cross-Examination, The Fact That A Chief State Witness Had Orginally Pleaded "Not Guilty" To The Same Crime As That With Which The Petitioner Was Charged And That His Subsequent Change Of Plea To "Guilty" Was Directly Connected To His Testimony On Behalf Of The State.

Witness Guglielmo was originally indentically charged with Petitioner. His original plea was one of "not guilty." He subsequently changed his plea to "guilty." Petitioner's counsel, upon cross-examination, attempted to elicit these facts before the Jury and to further question the witness as to his present testimony on behalf of the State as related to the imposition of sentence based upon said "guilty" plea. The State's objections to these questions were sustained. The Connecticut Supreme Court acknowledged that these Trial Court rulings constituted error but considered them harmless error utilizing the standard of whether or not the rulings could reasonably have affected the verdict. Petitioner contends that under the standard of *Chapman, supra,* this error was of Constitutional magnitude and constituted reversible error.

Wherefore, Petitioner submits that should he be remanded by the Respondent to the Connecticut State Penitentiary, he

will be restrained of his liberty in violation of the Constitution of the United States; and he, therefore, prays:

1. That an evidentiary hearing be held at which time Petitioner may submit evidence in support of the allegations contained herein;

2. That this Writ be granted and an Order be entered discharging him from custody pending his release from the Federal sentence hereinabove referred to; and

3. For such other and further relief as this Court may deem just and proper.

By his attorneys,

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UNITED STATES COURT OF APPEALS
For The Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of November one thousand nine hundred and seventy-one.

Present:

Hon. Henry J. Friendly, *Chief Judge*
Hon. Wilfred Feinberg, *Circuit Judge*
Hon. Oscar H. Davis, *U.S. Court of Claims.*

Ralph Toscano,
PETITIONER-APPELLANT,

v.

Robert I. Mosely, Warden, Federal Penitentiary, Leavenworth, Kansas,
RESPONDENT-APPELLEE.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk